Supreme Court, U.S.
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92-354

Case No. _____

SUPREME COURT OF THE UNITED STATES

October 1992 Term

CHARLES LOUIS DECARLO,
Petitioner

v.

STATE OF FLORIDA,
Respondent

Petition for Writ of Certiorari to the
District Court of Appeal
Fifth Appellate District,
State of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether the Petitioner was entrapped as a matter of law and whether his right to due process of law was violated when law enforcement officers of the State of Florida, motivated by their agency's forfeiture agenda, targeted and approached the Petitioner with a reverse-sting narcotics transaction that promised exorbitant profit for the Petitioner, when the police had little or no evidence that the Petitioner was independently predisposed to commit the crimes for which he has been convicted.

PARTIES TO THE PROCEEDING

All parties in the District Court of Appeal of the State of Florida, Fifth District, appear in the caption of this Petition. Codefendants at trial in the Circuit Court of the Fifth Judicial Circuit in and for Marion County, Florida were David Allan Nelson; Allison Jesse Brown, Jr.; John Leonard Hanley; Bryon Alvin Dean and Bert Emery Braswell.

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OPINIONS BELOW

There are no opinions below, and therefore no official or unofficial reports of opinions.

JURISDICTIONAL GROUNDS

The Petitioner was convicted by a jury on January 28, 1991 of trafficking and conspiracy to traffic in cocaine (Sections 893.135(1)(b)3. and (5), Florida Statutes (1989)). The Circuit Court, Fifth Judicial Circuit in and for Marion County, Florida sentenced the Petitioner to a mandatory minimum fifteen years imprisonment and a $750,000.00 fine on May 1, 1991.[1] On direct appeal, the District Court of Appeal of the State of Florida, Fifth District, affirmed the Petitioner's convictions in an unreported

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[1](a-18 through a-26). All designations styled (a-1, a-2, etc.) are to pages in the APPENDIX, attached hereto.

27 May 1992 per curiam Decision without opinion. Charles Louis DeCarlo v. State of Florida, Case No. 91-1070 (Fla. 5th DCA, Apr. 28, 1992)(a-1). The Fifth District Court of Appeal denied rehearing, clarification or certification by unreported Order without opinion dated 27 May 1992 (a-2).

Petitioner DeCarlo seeks this Court's review pursuant to 28 U.S.C. Section 1257(3), which confers jurisdiction on this Court. The Petitioner submits, pursuant to Rule 10.1(c), Rules of the Supreme Court of the United States, that the Fifth District Court of Appeal's Decision affirming the Circuit Court's denial of relief on issues of entrapment as a matter of law decides important questions of Federal law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

At issue in this proceeding are:

1. Amendment V of the Constitution of the United States of America, which provides in relevant part:

* * *

> No persons shall be deprived of life, liberty, or property, without due process of law;...

2. Amendment XIV of the Constitution of the United States of America, which provides in relevant part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section 893.135(1)(b)3., Florida Statutes (1989) provides:

> (1) Except as authorized in this

chapter or in chapter 499 and notwithstanding the provisions of s. 893.13:

* * *

(b) Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine as described in s.893.03(2)(a) 4. or of any mixture containing cocaine is guilty of a felony of the first degree, which felony shall be known as "trafficking in cocaine." If the quantity involved:

* * *

3. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

4. Section 893.135(5), Florida Statutes (1989) provides in relevant part:

(5) Any person who agrees, conspires, combines, or confederates with another person to commit any act prohibited by subsection (1) is guilty of a felony of the first degree ....

STATEMENT OF THE CASE

Facts

In February 1989, Levy County, Florida Sheriff Ted Glass (Glass) approached the Florida Department of Law Enforcement (FDLE) seeking that agency's investigative assistance with a perceived narcotics problem in the Levy County town of Cedar Key. Glass made contact with FDLE Special Agent Michael Cervellera (Cervellera) and provided Cervellera with a list of the names of eighteen or nineteen individuals who were suspected of drug-related activity in Cedar Key. Petitioner DeCarlo was not named in that list.

From February until June or July, 1989, the investigation, dubbed "Operation Fishhook," examined information relating to alleged drug activity in the Cedar Key area. Agents reviewed newspaper accounts, an unsigned

letter from a "concerned parent," and other "intelligence" information of activity around the Cedar Key Airport. Petitioner DeCarlo's name surfaced only once in connection with a 1984 crash at his airstrip in Rosewood, Florida; allegedly, he had been present afterwards. No drugs or contraband had been found in that 1984 incident, despite a joint investigation by State and Federal law enforcement agencies.

Similarly, the FDLE-led 1989 "Operation Fishhook" netted no arrests in its first six months. Finally, in July, 1989, FDLE decided to initiate a statewide search for a confidential source to work the Cedar Key area. Case Agent Cervellera travelled to Orlando, Florida where he met with a confidential source, Jason Byers (Byers).

Byers, described by the State at trial as "not the top rung of life," had

been arrested by FDLE and was admittedly "working it off" in Operation Fishhook. Byers had pending charges from 1988 and 1989 arrests including possession of automatic weapons, attempted armed robbery, solicitation to commit robbery, carrying a concealed firearm, and grand theft. Prior to agreeing to cooperate, Byers faced, upon conviction, a sentence of fifteen to twenty-five years imprisonment. After the Petitioner's arrest, Byers pled nolo contendere to reduced charges involving no firearm or mandatory minimum counts and was placed not in jail, but on community control.

Byers was told that his job was to go in to Cedar Key and see if he could purchase narcotics. Although Cervellera had the list of specific individuals suspected of drug-related activity in the very area under investigation, Byers was never given the list or told the names by

controlling agent Cervellera or anyone else. Rather, Byers was instructed to "hang out in bars" in search of anyone who would sell narcotics to him.

Byers commenced his weekend activities in Cedar Key sometime in August, 1989. Byers was advised that while working in Cedar Key on weekends, his contact with agents would be by phone and he was to identify "street-level" dealers on his own. He was to receive $300.00 per weekend including "drink money." Ultimately, FDLE paid Byers between $6,000.00 and $7,000.00 for his assistance.

Cervellera had never met or worked with Byers in the past and had no firsthand knowledge of Byers' credibility or reliability. During the entire nine month period Byers participated in Operation Fishhook, he was never tested for drug use. He was contacted by his

controlling agent only twice in the field from August, 1989 until the arrival of FDLE Agent Kenneth Bridges (Bridges) in Cedar Key in October, 1989. Byers was never successful in making any narcotics buys ir Cedar Key.

On September 25, 1989, while attempting to locate rental space for an undercover FDLE storefront, Byers had a "chance" meeting with Petitioner DeCarlo outside a Cedar Key waterfront complex owned by DeCarlo and known as the "Cedars Mall." Byers, who had been working the Cedar Key area for narcotics for approximately two months, knew nothing of DeCarlo prior to the unrecorded meeting on September 25, 1989. Yet ten days after the brief meeting with DeCarlo, duly reported to Case Agent Cervellera, Byers was informed his role had been changed.

On October 5, 1989, Byers was

instructed by Cervellera to stop asking people for narcotics and, instead, to spread the word in Cedar Key that he had a brother, "Ray" (FDLE Agent Roger Martindill) who would pose as a pilot interested in setting up a charter flight service in Cedar Key. Byers was instructed to locate a site that "Ray" could fly into to "flash an aircraft."

Despite having received "a lot of intelligence" information in the past related to the Cedar Key Municipal Airport from Sheriff Glass and his predecessors, Cervellera instructed Byers to contact DeCarlo to secure his permission to allow "Ray" to use DeCarlo's grass airstrip, located outside Cedar Key in the town of Rosewood. Byers did so, and DeCarlo, agreed.

Sometime between September and November, 1989, Cervellera had used the REDI computer index to determine

DeCarlo's substantial property holdings, despite the absence of activity of any investigatory significance during this time period. This information was used for "Ray's" role, to portray that undercover officer as someone interested in real estate investments as part of his future charter flight operation in Cedar Key.

Martindill was instructed by Cervellera to fly from Tampa to Williston in Levy County, Florida, where he met Byers before proceeding to DeCarlo's Rosewood airstrip. Byers advised Martindill that DeCarlo was a real estate broker and had "quite a bit" of real estate that he was interested in selling. Byers identified individual parcels that DeCarlo owned. Byers specifically related to Martindill that DeCarlo was interested in selling property to "Ray." Martindill said he was instructed by

Cervellera specifically to meet DeCarlo.

Upon landing, Byers introduced "Ray" to DeCarlo. Martindill informed DeCarlo he was a charter pilot. Immediately thereafter, DeCarlo told Martindill of the properties he owned in the area. DeCarlo specifically told Martindill the properties were for sale and touted them as a good resort area for hunting.

After their meeting, Martindill departed with Byers and they visited DeCarlo's "Cedars Lounge" in Cedar Key, a drinking establishment in the Mall. No suspicious activity was observed.

Also in October 1989, Special Agent Bridges (Bridges) was assigned to the role of Byers' "friend," interested in renting property for a video store in Cedar Key, Florida. He was advised as part of debriefing that DeCarlo was one of the subjects of the investigation. Three days before the opening of the

Cedar Key Videostore, on January 7, 1990, Bridges was again debriefed and again given DeCarlo's name. The next day, DeCarlo was described by Bridges in his investigative report as one of the "major targets" of this investigation.

As part of his briefing, Bridges was instructed by Cervellera to commence eating at DeCarlo's Cedars Restaurant in Rosewood, located at least eight miles from the Cedar Key videostore. Bridges was not instructed to, and did not, frequent any other business establishment outside Cedar Key up to the day of DeCarlo's arrest. The primary reason for the visits to Rosewood concededly was to contact DeCarlo, in an attempt to gain his confidence.

On January 20, 1990, upon instructions, Bridges and Byers left a note for DeCarlo at his Rosewood restaurant, asking permission for "Ray"

to fly in to DeCarlo's strip again. Although DeCarlo never responded to the note, plans proceeded to have FDLE agents Gene Caso (Caso) and Carlos Bosch (Bosch) fly with Martindill to DeCarlo's Rosewood strip to be seen and pose as wealthy Hispanics who were to be introduced as "Ray's" business partners.

Upon landing at the Rosewood airstrip on January 26, 1990, Byers, Bridges, Martindill, Caso and Bosch immediately entered DeCarlo's Cedars Restaurant next to the airstrip. DeCarlo came to their table and was introduced to Caso and Bosch. When DeCarlo asked Bosch and Caso why they are in Cedar Key, Bosch replied that he was looking for property. When DeCarlo inquired about the undercover agents' interest in buying the restaurant they were sitting in, Bosch replied "maybe down the road." Bosch reported seeing a "for sale" sign on the

restaurant and knew DeCarlo had property for sale.

Bosch had engaged in discussions with Cervellera preceding the visit regarding DeCarlo's target status and authored a report documenting his activities on January 26, 1990, wherein he described DeCarlo as the main suspect in the investigation. Bosch noted that he was instructed to meet DeCarlo on that date, and he was introduced to no one else. The only businesses he was to visit on January 26, 1990 were the lounge and restaurant owned by DeCarlo and those were the only businesses he visited that day. Bosch observed nothing suspicious at the Rosewood location on his visit.

Agent Caso, who described his role on January 26, 1990 as a "prop," got his debriefing about DeCarlo's property holdings from Bosch. Caso likewise was never instructed to meet anyone other

than DeCarlo and observed nothing suspicious at the Rosewood property, despite DeCarlo's lack of forewarning of the visit. There was no discussion of drugs by DeCarlo or by others in his presence.

Later on the evening of January 26, 1991, both Byers and Bridges went to a bar in Cedar Key not owned by DeCarlo, at which time two separate individuals approached the source about drugs. A third individual thereafter approached the source to advise that she could provide Byers with cocaine. Agent Bridges was ten feet away when the statement was made, but a full year after the event none of these individuals had been arrested.

Despite a total absence of suspicious activity by DeCarlo, or upon any of his properties, a decision was made for "Ray" to simulate a "drop" of cocaine at

DeCarlo's Rosewood airstrip in February, 1990. DeCarlo's permission for the landing was never received nor sought by the undercover officers or their source. They flew into DeCarlo's airstrip on February 16, 1990 on a simulated drug drop. They generated no response, so a second simulated drop was set for March 2, 1990 which called for low flying and buzzing of houses in the area. Likewise, DeCarlo was never told by anyone in advance of this second simulated drop.

On March 17, 1990, DeCarlo questioned the source and Bridges about the use of the strip without his permission. FDLE, at this point, decided to set up a meeting between DeCarlo and Carlos where Carlos would "approach him directly." Byers initiated, on his own, an unrecorded telephone call to DeCarlo to invite him to the meeting with Carlos at the videostore, which was to be recorded.

As of the day of the March 27, 1990 meeting, the investigation had been in full swing for eight months. DeCarlo had never invited or engaged in any discussion with either the FDLE or the source involving narcotics. The developed habit of Byers and Bridges to frequent DeCarlo's airstrip, restaurant and Cedar Key lounge from January 5, 1990 until March 26, 1990 had grown into a barrage of opportunities to observe DeCarlo and his properties. Byers estimated he and Bridges ate at DeCarlo's restaurant in Rosewood twenty-five times during that time period. Bridges agreed that there were actually forty-five visits to DeCarlo and his businesses from January 5, 1990 to March 26, 1990. None of these contacts or visits during this time period resulted in an audio or video recording, whereas nearly every contact after March 27, 1990 was recorded by

audio or video or both.

DeCarlo's drinking habits were noted during the investigation. The source described several occasions when he observed DeCarlo intoxicated. This fact was reported to Case Agent Cervellera. In fact, on March 17, 1990, the day DeCarlo confronted Bridges and Byers about rumors his airstrip had been used, it was Agent Bridges himself who offered to buy DeCarlo a drink. And, during the ride to the videostore on April 27, 1990, "Carlos" noted a bottle of liquor under the seat of DeCarlo's truck.

It was during the course of the videostore meeting that Carlos first told DeCarlo that he was part of a "Colombian" organization that had already used his airstrip, without his knowledge or permission, on two previous occasions to fly in cocaine. DeCarlo indicated at least a willingness to assist in locating

boat people when FDLE suggested a possible future maritime operation, although he had no crew of "boat people" ready. DeCarlo then immediately reminded Carlos both of the property he had for sale and of Carlos' previously-stated interest in purchasing that property.

DeCarlo advised Carlos that he was sixty-four years old and ready to get rid of the properties that he had inherited and held mortgage-free from his father. He described his family relationships in detail, noting that he was single, not close to his sister, and that he was caring for his mother, who was in her nineties and who lived in a house across from the airstrip.

Immediately after the meeting was concluded at the videostore, DeCarlo tracked the FDLE agent down at another restaurant and supplied Bridges with property documents, brochures and

prospectus' to give to Carlos.

Two days later, on March 31, 1990, DeCarlo gave Bridges and Byers a tour of his properties. Byers and Bridges recalled DeCarlo going into great detail about 280 acre parcel which had been subdivided prior to the enactment of the restrictive Growth Management Act, thus making the property worth about $5,000.00 per acre. DeCarlo reiterated that his properties were free of mortgages. Byers noted that he felt DeCarlo was "obsessed" with the notion of his properties and that DeCarlo always brought up the subject of his properties in any lengthy discussion.

After the March 31, 1990 property tour, Case Agent Cervellera instructed his agents in Cedar Key to contact DeCarlo again about another meeting, this time in Ocala, Marion County, Florida at the Hilton Hotel. Prior to the meeting,

FDLE agents met in a strategy session where Case Agent Cervellera defined the roles of the participants and the scope of the operation that was to be discussed. The subject of forfeiting DeCarlo's various properties was discussed at this meeting. DeCarlo was to be told that four separate storage sites were required. DeCarlo also was to be told that he should assist in allowing his properties to be used as those storage sites.

DeCarlo was to be told he would receive the sum of over one million dollars in the deal. DeCarlo was to be told that larger profits could be made in the future, but that before the maritime operation could take place the "organization" needed to raise "fast cash" by using his airstrip one more time for an airdrop of cocaine.

DeCarlo arrived at the meeting with

property documents. The subject of sale of his properties ensued. Caso agreed to purchase DeCarlo's Cedars Mall for one million, five hundred thousand dollars ($1,500,000.00). Caso assured DeCarlo that the Carlos organization was "definitely interested in buying DeCarlo's property."

During the course of the Hilton meeting, DeCarlo was asked by Caso what his fee would be for his services in helping to provide storage sites and boat people. DeCarlo responded that he was not familiar with the cocaine market.

During the meeting, Bosch suggested that DeCarlo take "product" in lieu of fee -- a proposal DeCarlo immediately rejected. DeCarlo also spurned Bosch's suggestion that he reinvest the profits from this load into future loads.

On April 23, 1990, a fly-in of cocaine to DeCarlo's airstrip was made to

raise the "fast cash" for the Carlos organization. DeCarlo was present at the airstrip but never had physical contact with the load. Nor did he express any interest in checking on the load which was being temporarily stored, outside his presence, at his residence.

Just as a decision had been made after the April 10, 1990 Ocala Hilton meeting not to arrest DeCarlo for conspiracy, FDLE decided that arresting DeCarlo for trafficking in cocaine after the April 23, 1990 fly-in "would not have extended the investigation as we (they) wished it to."

On April 24, 1990, a meeting was held at the Ocala Days Inn to further discuss plans for the planned vessel load and to provide DeCarlo with an unsolicited payment for the use of his airstrip. There was extensive discussion between DeCarlo and Bosch about the sale of

DeCarlo's properties to the Carlos organization.

On May 6, 1990, DeCarlo provided Bridges with a series of documents relating to the purchase by the Carlos organization of his properties. On the morning of May 15, 1990, the day of the vessel load, and the day of DeCarlo's arrest, DeCarlo was still actively discussing the arrangements concerning the sale of his properties with undercover FDLE agents.

As of May 15, 1990, the undercover agents had agreed that DeCarlo was to receive $3,000,00.00 in cash for his services and the sale of his Cedar Key Mall upon completion of the vessel off-load.

During the off-loading procedure, DeCarlo remained at the videostore with Bridges, Bosch and others discussing the operation and DeCarlo's property sale.

The vessel was unloaded by boat people from both sides with FDLE's undercover agents maintaining control of the cocaine at all times. The cocaine was then moved to storage sites for pick-up by FDLE's phantom buyers. DeCarlo was arrested without incident at the videostore in the presence of the media, who had been notified by law enforcement.

Having accumulated documents and information regarding DeCarlo's properties dating back to the REDI index check in October or November of 1989, the accumulated paperwork was used to form the basis of a series of four (4) separate In Rem forfeiture actions against the storage sites filed in Levy County, Florida on May 16, 1990. Case Agent Cervellera was the affiant who filed in support of FDLE, claiming that all of DeCarlo's mortgage-free property should be forfeited to the State of

Florida based upon its use in the investigation, even though from at least March 31, 1990, FDLE had known that DeCarlo had inherited the properties from his father.

The State's own witness testified that during the entire course of FDLE's nine month investigation in Cedar Key of CHARLES LOUIS DECARLO, and specifically from the January 5, 1990 arrival of sworn FDLE Agent Bridges until the arrest of DeCarlo, there was never suspicious activity not generated by FDLE itself occurring on DeCarlo's properties. Most importantly, however, FDLE admittedly discovered no ongoing drug-related criminal activity on the part of DeCarlo aside from that which FDLE introduced to him. There was never an ongoing criminal investigation involving DeCarlo during the entire nine months other than the one that was being generated by FDLE itself.

Raising the Federal Question

On May 29, 1990, the Office of Statewide Prosecution filed a three count Information against DeCarlo and others alleging two counts of trafficking in cocaine and one count of conspiracy to traffic in cocaine. DeCarlo filed his plea of not guilty and a series of pretrial motions, including his Motion to Dismiss Due to Entrapment as a Matter of Law (a-27 through a-47). The Motion was denied pretrial without opinion (a-3).

DeCarlo reasserted his defense of entrapment as a matter of law at judgment of acquittal (a-5 through a-11), which was denied (a-12) without opinion. Upon DeCarlo's conviction by the jury, post-trial motions were filed again preserving the issue, which also were denied without benefit of opinion (a-13 through a-17).

The Petitioner raised the entrapment issue as his primary argument on direct

appeal to the Fifth District Court of Appeal for the State of Florida (a-48 through a-66). Despite the substantial factual record and argument on appeal regarding this issue, the Fifth District Court of Appeal denied any appellate relief without opinion (a-1) and denied rehearing, clarification or certification a-2), thereby precluding DeCarlo from any review in the Florida Supreme Court.[2]

ARGUMENT

Summary of Argument

The Petitioner submits that under this Court's precedent, his convictions should be set aside and sentences vacated because he was entrapped as a matter of law. Under Jacobson v. United States, 503 U.S.____, 112 S.Ct. 1535 (1992), the State of Florida failed to prove beyond a reasonable doubt that the Petitioner

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[2]The Florida Star v. B.J.F., 530 So.2d 286, 288-89 & n.3 (Fla. 1988).

was predisposed, "independent of the Government's acts and beyond a reasonable doubt," to violate Florida's narcotics trafficking laws. Jacobson v. United States, 503 U.S. ___, 112 S.Ct. at 1543. In its "zeal to enforce the law," State law enforcement agents went too far; they "originate[d] a criminal design, implant[ed] in an innocent person's mind the disposition to commit a criminal act, and then induce[d] commission of the crime so that the ...[State] ... may prosecute." Id., 503 U.S. ___, 112 S.Ct. at 1540.

In so doing, State law enforcement officers did not interrupt any specific, ongoing criminal activity; rather, they targeted and persuaded the Petitioner to engage in illegal activity through the inducement of exorbitant financial gain. The State's motivation for using such means is simply stated: The State sought

to establish a factual predicate for forfeitures of the Petitioner's substantial real and personal properties. That goal became the primary motivation for the conduct of the State's reverse-sting investigation.

In turn, that improper motivation of the State violates a second line of precedent from this Court, commonly referred to as either the "objective" or "due process" theories of entrapment. While this Court has not articulated specific standards for such defenses, the Petitioner submits that the State law enforcement officers' conduct in the investigation of this case offends both public policy and basic notions of fundamental fairness.

Jacobson Applied

From FDLE's initial contact with Petitioner DeCarlo until the

investigation was completed culminating in Petitioner's arrest, FDLE did not uncover any ongoing drug-related criminal activity concerning the Petitioner other than that which was introduced to DeCarlo by FDLE itself as part of "Operation Fishhook." By the State's testimony in both pretrial and trial proceedings, DeCarlo was not included in the list of individuals suspected of narcotics-related activity in Cedar Key when the investigation commenced. Prior to Bryer's first "chance" meeting with DeCarlo, the Petitioner was not known to law enforcement. Agent Bridges, the only sworn FDLE officer continuously present in Cedar Key, conceded this in his trial testimony:

> "Q All right. My question is from the time period that you started your investigation on January 5th, 1990, until May 15th of 1990 you didn't discover any other ongoing drug related criminal activity

concerning Mr. DeCarlo other than that which you introduced to him; correct?

A Correct.

Q And, in fact, on January 5th, 1990, when you commenced your activities, there was no ongoing investigation of any drug related activity involving Mr. DeCarlo?

A Not that I'm aware of, no."

In sum, the police activity in this case did not have as its end the interruption of any specific ongoing criminal activity of the Petitioner.[3]

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[3]Under Florida Supreme Court precedent, the Defendant is entitled to a finding of entrapment as a matter of law without reference to predisposition of the accused. Cruz v. State, 465 So.2d 516 (Fla. 1985), cert. denied, 473 U.S. 905 (1985):

> "To guide the trial courts, we propound the following threshold test of an entrapment defense: Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal

"When the Government's quest for conviction leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene." Jacobson v. United States, 503 U.S.___, 112 S.Ct. at 1543. In Jacobson, the Government failed to establish that Petitioner Jacobson was predisposed, independent of the Government's child pornography investigation, to commit such a crime. The only evidence of predisposition appeared to be "the product of the attention that the Government had directed at petitioner ...." Id., 503 U.S. ___, 112 S.Ct. at 1541. Similarly, in the instant case there is no evidence

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activity.

Id. at 522. See also State v. Hunter, 586 So.2d 319 (Fla. 1991); Marrero v. State, 493 So.2d 463 (Fla. 3d DCA 1985), review denied, 488 So.2d 831 (Fla. 1986).

of DeCarlo's predisposition to commit any crime, let alone drug trafficking, prior to the investigation launched by the Florida Department of Law Enforcement over a nine-month period in 1989.

Under these facts, the State's inducement to the Petitioner to engage in criminal activity becomes highly relevant. The Petitioner does not contend that the State of Florida cannot use undercover agents to enforce the law. This Court has held otherwise. Jacobson v. United States, supra, 503 U.S.___, 112 S.Ct. at 1540. Indeed, "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises." Id., quoting Sorrells v. United States, 287 U.S. 435, 441 (1932); Sherman v. United States, 356 U.S. 369, 372 (1958); United States v. Russell, 411 U.S. 423, 435-36 (1973). Nonetheless, the State cannot, as it did in this case, prosecute an

offense that originates with a criminal design created by the State and which that government then induces the Petitioner to commit. Jacobson v. United States, 503 U.S.___, 112 S.Ct. at 1540, citing, Sorrells, 287 U.S. at 442; Sherman, 356 U.S. at 372.

This is precisely what happened in the "Operation Fishhook" investigation. Having possession of a list of specific names of individuals suspected of being involved in ongoing criminal activity, supplied by the chief law enforcement officer in the county where the investigation was to take place and before the investigation was initiated, FDLE chose to ignore the names on the list and targeted, instead, someone not on the list -- Petitioner DeCarlo. When FDLE's own surveillance failed to reveal any drug-related transactions from February until July, 1989, FDLE initiated

a statewide search for a confidential source who, when located, was specifically and intentionally deprived of that list of individuals.[4]

Thereafter, despite no observation of criminal activity by Petitioner DeCarlo on any of his properties or elsewhere, the field agents and the source made forty-five documented visits to DeCarlo and his properties to gain his confidence. The agents' plan was obvious. From their initial meeting with

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[4]Further, the source FDLE selected to initiate the investigation of "street-level" drug activity was himself working off a cooperation agreement on a plethora of serious felony offenses. The source was compensated both for his "services" as well as his expenses and was placed upon a form of supervision, community control, that specifically would have precluded nearly each and every activity he engaged in for FDLE during his work in Cedar Key. For five of the nine months of FDLE's investigation, the source's activities were monitored, if at all, only by telephone. Told to make contact with drug suspects, the source himself was never tested for drugs by his controlling agent.

DeCarlo on September 25, 1989 through their source, who initiated unrecorded conversations regarding DeCarlo's property, every contact FDLE made with DeCarlo involved a scheme in which full and unfair advantage was taken of the elderly man's obsession with the sale of his mortgage-free properties, most of which his father had purchased in years past. FDLE constructed its operation so as to allow DeCarlo, a man with no prior record, an opportunity to sell his properties and to realize an exorbitant gain (3 million dollars plus the possibility of future purchases of DeCarlo's other properties. DeCarlo succumbed.[5]

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[5]It must be noted that FDLE had full knowledge throughout the course of the investigation of DeCarlo's additional vulnerability through the excessive consumption of alcohol, a vulnerability which they capitalized upon by offering to buy him drinks during critical stages of the investigation, as well as by creating video tapes in which DeCarlo discussed drug activities while under the influence

"Law enforcement officials go too far when they 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.' Sorrells v. United States, 287 U.S. 435, at 442, 53 S.Ct. 210, at 212-213, 77 L.Ed. 413 (emphasis added)." Jacobson v. United States, 503 U.S.___, 112 S.Ct. at 1543. Under the Jacobson decision, the Petitioner was entrapped as a matter of law.

Beyond Jacobson

The State of Florida's investigation was motivated by the promise of forfeiture of the Petitioner's properties. This motivation, and the means the State employed to carry out its design, presents an additional defense of entrapment as a matter of law in this

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of alcohol.

case.

That defense, described either as "objective entrapment" or the due process-based defense of "outrageous" government conduct, was first articulated in Sorrells v. United States, 287 U.S. 435, 451 (1932), in which the Court stated that the controlling inquiry in entrapment law is "whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." Id. at 451. Justice Roberts, concurring, expanded on this analysis and provided an alternative view that focuses on the Government's conduct rather than a defendant's predisposition to commit a charged offense. See United States v. Russell, 411 U.S. at 429 (discussing Justice Roberts' concurrence in the Sorrells case). Commonly referred

to as the "objective theory" of entrapment, this view allows a finding of entrapment if the Government's conduct exceeds permissible limits.[6]

In Sherman v. United States, 356 U.S. 369 (1958), this Court again addressed the entrapment defense. The Court held, as in Jacobson, that a defendant was not predisposed to commit the crime and thus the entrapment defense should have been available to him as a matter of law. Id. at 373. The concurring opinion focused on improper conduct by the Government:

> The crucial question, not easy of answer, to which the court must direct itself, is whether the police conduct revealed in a particular case falls below standards, to which common feelings respond, for the proper use of governmental power. For

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[6]Note, Crossing the Constitutional Line: Due Process and the Law Enforcement Justification, 67 Notre Dame L. Rev. 745, 755-58 (1992); Case Note, United States v. Jacobson: Are Child Pornography Stings Creating Law Enforcement or Entrapment, 46 U. Miami L. Rev. 235, 240-41 (1991).

> answer it is wholly irrelevant to ask if the 'intention' to commit the crime originated with the defendant or government officers, or if the criminal conduct was the product of 'the creative activity' of law enforcement officers.

Id. at 382 (Frankfurter, J., concurring).

In United States v. Russell, 411 U.S. 423 (1973) this Court again defined entrapment in the context of a defendant's predisposition. Yet the Court stated:

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed .... The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process clause of the Fifth Amendment."

Id. at 431-32 (citations omitted).

The plurality decision in Hampton v.

United States, 425 U.S. 484 (1976) would appear to reject this "due process" defense; however, the Court was unable to reach a majority decision, deciding the merits of that case solely on the issue of the defendant's predisposition. Id. at 488-89. Yet again, a concurring opinion reserved the availability of a due process defense even if the Government is able to establish predisposition. Id. at 495 (Powell, J., concurring).

While this Court has not addressed the availability of this defense in recent years, the Circuit Courts have preserved the issue. See, e.g., United States v. Mosley, 965 F.2d 906, 908-15 (10th Cir. 1992)("[n]o Federal court has defined the requirements of the outrageous conduct defense with any degree of precision," id. at 910); United States v. Bogart, 783 F.2d 1428, 1434-38

(9th Cir.), vacated sub nom. United States v. Wingender, 790 F.2d 802 (9th Cir. 1986)(remanded for further findings of fact as to codefendant's claim of outrageous governmental conduct); United States v. Savage, 701 F.2d 867, 878-70 (11th Cir. 1983); United States v. Brown, 635 F.2d 1207, 1211-1214 (6th Cir. 1980); United States v. Tobias, 662 F.2d 281, 383-84 (5th Cir. 1981), cert. denied, 457 U.S. 1108 (1982) ("[o]n the other end of the spectrum, however, the Government may not instigate the criminal activity, provide the place, equipment, supplies and knowhow, and run the entire operation with only meager assistance from the defendants without violating fundamental fairness," id., at 386); United States v. Twigg, 588 F.2d 373, 376-81 (3d Cir. 1978) reaffirmed in United States v. Jannotti 673 F.2d 578, 606-610 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106

(1982) (Twigg is generally recognized as the leading Federal Circuit decision on the availability and applicability of the due process defense).[7]

It is apparent that the lower courts are struggling with the availability and applicability of this defense. The Petitioner submits that the facts of the instant case present an opportunity for this Court to define and apply an objective or due process-based defense that focuses on Government misconduct, and specifically on the motivation underlying techniques such as those used by the State of Florida to create and perpetuate the investigation, prosecution and conviction of the Petitioner herein. The devices used by the State --

---

[7]This listing of cases is by no means exhaustive. See, e.g., numerous cases recounted in Gershman, The New Prosecutors, 53 U. Pitt. L. Rev. 393, 395-400 & nn. 16-36 (1992).

initiating contact with the Petitioner and repeatedly approaching him, employing an unreliable and unmonitored informant, playing on the Petitioner's desire to sell his properties, taking advantage of the Petitioner's excessive use of alcohol, and presenting an unfettered opportunity for the Petitioner to make exorbitant gain -- are contrary to public policy and are outrageous, offending the fundamental sense of fair play contemplated by the Due Process clause.

These techniques are even more unacceptable because they were motivated by the State's greed -- a greed for forfeiting substantial properties otherwise legitimately owned by the Petitioner. Law enforcement purposely set up the Petitioner to use his properties so that those properties might be forfeited. No reported decision directly deals with the due process

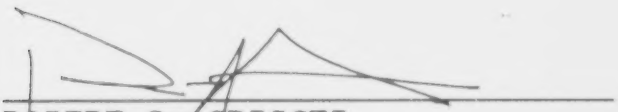
defense as applied to facts similar to those presented in this case, and particularly to – a reverse-sting investigation motivated by the State's interest in forfeiting properties. This motivation is unconscionable and by any objective analysis unacceptable, if not unconstitutional, and this Court should so hold.

Conclusion

For these reasons, Petitioner CHARLES LOUIS DECARLO respectfully prays that this Court accept jurisdiction and issue its Writ of Certiorari in this cause to the Fifth District Court of Appeal, State of Florida, reversing the convictions and sentences of the Petitioner.

Respectfully submitted,

LAW OFFICES OF TURNER & GRISCTI, PA



ROBERT S. GRISCTI
Counsel of Record
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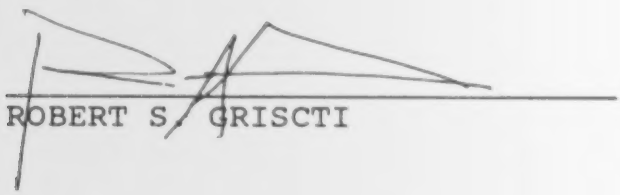
204 West University Avenue
Suite 6
Gainesville, Florida 32601
Florida Bar No. 300446
904/375-4460

CERTIFICATE OF SERVICE

I HEREBY CERTIFY copy of the PETITION FOR WRIT OF CERTIORARI and APPENDIX thereto have been furnished by regular United States mail to ROBERT A. BUTTERWORTH, Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 and to the Office of the Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 this 25th day of August, 1992.



ROBERT S. GRISCTI

Case No. _____

SUPREME COURT OF THE UNITED STATES

October 1992 Term

CHARLES LOUIS DECARLO,
Petitioner

v.

STATE OF FLORIDA,
Respondent

Petition for Writ of Certiorari to the
District Court of Appeal
Fifth Appellate District,
State of Florida

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Robert S. Griscti
Counsel of Record
Turner & Griscti, P.A.
204 West University Avenue, Suite 6
Gainesville, Florida 32601
(904) 375-4460

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i. Opinions and Orders of the Fifth District Court of Appeal

a. Decision

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1992

CHARLES LOUIS DECARLO,

Appellant,

v. CASE NO. 91-1070

STATE OF FLORIDA,

Appellee.

_____/

Decision filed April 28, 1992

Appeal from the Circuit Court
for Marion County,
William T. Swigert, Sr., Judge.

Gilbert A. Schaffnit, Gainesville,
for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Anthony J. Golden,
Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED.

HARRIS, PETERSON, and GRIFFIN, JJ.,
concur.

b. Order on Rehearing

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT

CHARLES LOUIS DECARLO,
Appellant,

v. — Case No. 91-1070

STATE OF FLORIDA,
Appellee.
_____/

DATE: May 27, 1992

BY ORDER OF THE COURT:

ORDERED that Appellant's pro se Motion For Rehearing, filed May 12, 1992, is stricken. Appellant's MOTION FOR REHEARING, CLARIFICATION OR CERTIFICATION, filed May 13, 1992, is denied.

I hereby certify that the foregoing is (a true copy of) the original court order.
/S/
FRANK J. HABERSHAW, CLERK
BY:_____
Deputy Clerk

(COURT SEAL)

ii. Opinions and Orders of the Circuit Court

a. Trial Court Order Denying Pretrial Motion to Dismiss

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA, CASE NO. 90-1189-CF

Plaintiff,

vs.

(A) CHARLES LOUIS DECARLO,
(B) DAVID ALLEN NELSON,
(C) ALLISON JESSE BROWN, JR.,
(D) JOHN LEONARD HANLEY,
(E) BYRAN ALVIN DEAN,
(F) BRET EMERY BRASWELL,

Defendants.

ORDER

This Court, having heard the arguments of counsel and being well-advised of the law and the facts herein, it is hereby

ORDERED and ADJUDGED

That the Defendant DeCarlo and Nelson's Motions to Dismiss the

Information due to entrapment as a matter of law are denied.

Done and Ordered this 22 day of October, 1990, in chambers/open court at Ocala, Marion County, Florida.

/S/
WILLIAM T. SWIGERT
Circuit Judge

CERTIFICATE OF SERVICE

I Hereby Certify that a true and correct copy of the foregoing has been furnished to all counsel of record this 26 day of October, 1990.

/s/ Rosemary B. Spivey
JUDICIAL ASSISTANT

b. Trial Court Order Denying Motion for Judgment of Acquittal

Record, Vol. 14, page 2212:

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MARION COUNTY

CASE NO. 90-1119-CF-A,B,C,D,E,F

STATE OF FLORIDA,

Plaintiff,

vs.

A) CHARLES LOUIS DeCARLO,
B) DAVID ALLEN NELSON,
C) ALLISON JESSE BROWN, JR.,
D) JOHN LEONARD HANELY,
E) BYRON ALVIN DEAN,
F) BRET EMERY BRASWELL,

Defendants,

_____/

PROCEEDINGS: JURY TRIAL

BEFORE: William T. Swigert
Circuit Judge
Fifth Judicial Circuit
of Florida
Marion County
Courthouse
Ocala, Florida

DATE: January 24, 1991

PLACE: Courtroom A
Marion County
Courthouse
Ocala, Florida

REPORTED BY: K. Joann Lewis, RPR, CP
Deputy Official Court
Reporter
Fifth Judicial Circuit
of Florida
Ocala, Florida 32670

* * *

Record, Vol. One 14, pages 2245-49:

MR. SCHAFFNIT: Your Honor, I would adopt the grounds for judgment of acquittal made by counsel for Mr. Nelson and counsel for defendants Dean, Braswell, Brown and Hanley. This motion is made pursuant to Florida Rules of Criminal Procedure, Rule 3.380.

I would at this time specifically adopt all pre-trial motions that have been filed in this particular case, and including within that all motions that were made, which I would renew at this time, during the course of this trial.

* * *

We would also specifically like to address the motion that was filed pre-trial to dismiss all counts of the information due to entrapment as a matter of law. Again, I know I don't need to remind the Court of the Crews [sic] decision, but basically there is a distinction made by the Florida Supreme Court between objective and subjective entrapment.

The jury, when it is charged fully on the issue of entrapment, will consider the issue of entrapment on a subjective basis, and included within the subjective basis is the issue of predisposition. The predisposition issue is not a part or a prong of the objective test, which is the test that is a matter of law for the Court to decide.

We raised this in our previous motion, and applying the Crews [sic]

test, says applying the first prong of objective test to the case under review, we conclude -- and this is out of the Pezzella, P-E-Z-Z-E-L-L-A case, which is cited at 513 So.2d 1328, decision out of the Third DCA in 1987. This is laying out the Crews [sic] line of inquiry.

It says, we conclude that the police activity in question did not have as its end the interruption of specific ongoing criminal activity. Instead, the officers, with the cooperation of an informant, manufactured a crime by seeking out the defendant and persuading him, in this case to buy Quaaludes, supplied by the police. Prior to this episode the police had no information that the defendant was involved in any illicit drug activity.

With respect to that, your Honor, the ongoing -- the specific ongoing criminal activity, again the motion

speaks for itself, but clearly, none of the witnesses have testified that at the time they initiated investigation against Mr. DeCarlo, that they were aware of any specific ongoing criminal activity with respect to Mr. DeCarlo ipso facto they could not have interrupted its end, and as a result, given the fact that they did not have any information about specific ongoing activity, and in fact there was none, the first prong of the Crews [sic] test is met.

The second prong of the Crews [sic] test focuses again on the objective tests in evaluating the type of police activity utilized.

If the police employed methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those that are ready to commit the offense, the activity is permissible.

One of the things that the courts have looked to in terms of whether or not the police activity is improper and whether or not it creates a substantial risk is promises of exorbitant gain, and that is decided in the case of Lusby L-U-S-B-Y versus State, cited at 507 So.2d 611, a decision of the Fourth District Court of Appeal in 1987.

Once again, we're dealing with a situation where law enforcement is fully aware of the lack of ongoing criminal activity on the part of Mr. DeCarlo. Once they begin to focus on Mr. DeCarlo, they are aware of other aspects of the situation that are improper, including the fact that Mr. DeCarlo obviously at this point is drinking, drinking rather heavily, and part of the video tapes are done at the time where it's admitted by the witness that Mr. DeCarlo has been drinking.

As a result, those are just a few of the activities that are engaged in which are improper and which go to the techniques which is the second prong of the Crews test.

We believe that based on the Crews [sic] decision, the Marrero decision, M-A-R-R-E-R-O, cited at 493 So.2d 463, Florida Third DCA 1985, that the Court really has no alternative but to dismiss all counts of this particular information, because in this particular case, entrapment has occurred as a matter of law and it would be improper, again, utilizing the objective test, to submit this particular case to the jury because, in fact, entrapment has occurred as a matter of law, the Court now having had the benefit of all the testimony of the State's witnesses.

* * *

Record, volume 14, page 2299

THE COURT: All the motions denied.

c. Trial Court Order Denying Post-trial Motion

Record, volume 16, pages 2604-2615:

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MARION COUNTY

CASE NO. 90-1189-CF-AB-W

STATE OF FLORIDA, :

Plaintiff, :

vs. :

CHARLES LOUIS DeCARLO (A) :
and DAVID ALLEN NELSON (B) :

PROCEEDINGS:	Sentencing Proceedings
BEFORE:	William T. Swigert Circuit Judge Fifth Judicial Circuit In and For Marion County, Florida
REPORTED BY:	Kelly L. Owen Deputy Official Court Reporter
DATE AND TIME:	May 1, 1991; 2:00 p.m.
PLACE:	Courtroom D Marion County Courthouse Ocala, Florida

* * *

THE COURT: We're here for the sentencing on Charles Louis DeCarlo .... Any reason why the sentences should not now be pronounced?

* * *

MR. SCHAFFNIT: And with respect to the entrapment as a matter of law, which was the other main issue that was raised in the Motion for New Trial, I would like to point out to the Court --

And, again, I know it occurred sometime ago, but we specifically renew that as it relates to any ongoing criminal activity; that there was none under the Cruz standard and that when the Court heard the evidence at trial, the Court will note that anything -- of course, predisposition was not an issue as it related to objective entrapment, entrapment as a matter of law.

The focus of the pre-trial hearing on the entrapment as a matter of law was

under the objective test whether or not there was any specific ongoing activity. And at that time the State presented the testimony of the case agent as to just newspaper articles and a letter from a concerned parent; nothing that was focused upon Mr. DeCarlo.

There was presented to the Court something with respect to that 1984 plane crash. The Court heard no evidence at the trial concerning that and for a very good reason.

That was that upon interviewing all of the witnesses in that case, aside from the fact that there was nothing discovered on the plane of a contraband nature, nothing that would indicate there were any drug activities afoot, all of the reports of the NTSB and FAA, none of them indicated any foul play connected with that air crash.

And, of course, the air crash itself

was many, many years, several years before the Operation Fishhook even came up. But there was no evidence showing that DeCarlo was involved in any ongoing activity.

And as a result, we would specifically renew the motion that we had filed for dismissal for entrapment as a matter of law, even as it relates to this predisposition, which really it wasn't even an issue at that hearing.

The only predisposition evidence that came in against Mr. DeCarlo was the statement he made on the videotape, which obviously occurred well after FDLE's involvement, and the statements of Pickerell and McNaulty, neither of which were available when Mr. DeCarlo was arrested. McNaulty was contacted sometime later; so was Pickerell.

So even if predisposition were an issue on that pre-trial motion, which it

was not, the State has failed in its burden.

* * *

THE COURT: Good. Both motions denied.

BEST AVAILABLE COPY

iii. Judgment and Sentence

IN THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA

DIVISION Felony

CASE NUMBER 90-1189-CF-A-W

STATE OF FLORIDA

vs.

Charles DeCarlo
Defendant

JUDGMENT

The Defendant, Charles DeCarlo, being personally before this Court represented by Gilbert Schaffnit, his attorney of record, and having:

☒ Been tried and found guilty of the following crime(s)

COUNT	CRIME	OFFICE STATUTE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
One	Trafficking	893.03(2)(a)	1F	
	Cocaine	893.135(1)(b)3	1F	
Two	Trafficking	893.03(2)(a)	1F	
	Cocaine	893.135(1)(b)3	1F	
Three	Conspiracy	893.03(2)(a)4	1F	
	to Traffic	893.135(5)	1F	
	Cocaine	777.04	1F	

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

* * *

The Defendant is hereby ordered to pay the sum of ten dollars ($10.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of two dollars ($2.00) as a court cost pursuant to F.S. 943.25(4).

* * *

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

* * *

DONE AND ORDERED in Open Court at Ocala, Marion County, Florida, this 1st day of May, A.D., 19 91. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, Charles DeCarlo and that they were placed thereon by said Defendant in my presence in Open Court this date.

/S/ William T. Swigert
JUDGE

Defendant Charles DeCarlo

Case Number 90-1189-CF-A-W

SENTENCE

(As to Count One)

The Defendant, being personally before this Court, accompanied by his attorney, Gilbert Schaffnit, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

* * *

IT IS THE SENTENCE OF LAW that;

☒ The Defendant pay a fine of $ 250,000.00 plus $ _____ as the 5% surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to the custody of the Department of Corrections

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

☒ For a term of Fifteen (15) years

* * *

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Drug Trafficking-- mandatory minimum	☒	It is further ordered that the 15 year minimum provisions of F.S. 893.135(1)()() are hereby imposed for the sentence specified in this count.
Jail Credit	☒	It is further ordered that the Defendant shall be allowed a total of 351 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration optional):
Consecutive/ Concurrent		It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☒ concurrent with (check one) the sentence set forth in count II, III above.

Defendant Charles DeCarlo

Case Number 90-1189-CF-A-W

SENTENCE

(As to Count Two)

The Defendant, being personally before this Court, accompanied by his attorney, Gilbert Schaffnit, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

* * *

IT IS THE SENTENCE OF LAW that;

☒ The Defendant pay a fine of $ 250,000.00 plus $ _____ as the 5% surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to the custody of the Department of Corrections

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

☒ For a term of Fifteen (15) years

* * *

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Drug Trafficking-- mandatory minimum	☒	It is further ordered that the 15 year minimum provisions of F.S. 893.135(1)()() are hereby imposed for the sentence specified in this count.
Jail Credit	☒	It is further ordered that the Defendant shall be allowed a total of 351 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration optional):
Consecutive/ Concurrent		It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☒ concurrent with (check one) the sentence set forth in count II, III above.

Defendant Charles DeCarlo

Case Number 90-1189-CF-A-W

SENTENCE

(As to Count Three)

The Defendant, being personally before this Court, accompanied by his attorney, Gilbert Schaffnit, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

* * *

IT IS THE SENTENCE OF LAW that;

☒ The Defendant pay a fine of $ 250,000.00 plus $ _____ as the 5% surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to the custody of the Department of Corrections

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

☒ For a term of Fifteen (15) years

* * *

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Drug Trafficking-- mandatory minimum	☒	It is further ordered that the 15 year minimum provisions of F.S. 893.135(1)()() are hereby imposed for the sentence specified in this count.
Jail Credit	☒	It is further ordered that the Defendant shall be allowed a total of 351 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration optional):
Consecutive/ Concurrent		It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☒ concurrent with (check one) the sentence set forth in count II, III above.

* * *

In the event the above sentence is to the Department of Corrections, the Sheriff of Marion County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a coy of this Judgment and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indegency.

In imposing the above sentence, the Court further recommends that this sentence run concurrent with Federal sentence .

DONE AND ORDERED in Open Court at Ocala, Marion County, Florida, this 1st day of May A.D., 19 91.

/S/ William T. Swigert
JUDGE

iv. Other Materials

a. Pretrial Motion to Dismiss

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA, CASE NO: 90-1189-CF-A

Plaintiff,

vs.

CHARLES LOUIS DeCARLO,

Defendant.

MOTION TO DISMISS THE INFORMATION DUE TO ENTRAPMENT AS A MATTER OF LAW

COMES NOW the Defendant, CHARLES LOUIS DeCARLO, by and through his undersigned attorney, and respectfully moves this honorable court, pursuant to the provisions of Florida Rules of Criminal Procedure, Rule 3.190(b)(1990), to enter its order dismissing the Information herein due to entrapment as a matter of law and as grounds therefore would state as follows:

1. Florida Rules of Criminal Procedure, Rule 3.190(b) allows a motion to dismiss an Information as to matters of form, substance, former acquittal, former jeopardy, or "any other defense". Entrapment as a matter of law has been held to constitute a defense to a criminal charge. Cruz v. State, 465 So.2d 516 (Fla. 1985); State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982); Marrero v. State, 493 So.2d 463 (Fla. 3d DCA 1985). The Defendant herein reserves the right to file a separate motion pursuant to the provisions of Florida Rules of Criminal Procedure, Rule 3.190(c) (4) (1990), upon completion of discovery in the above referenced cause.

2. That the allegations of the within motion are based upon the Probable Cause Affidavit filed by Florida Department of Law Enforcement (FDLE) Case Agent Mike Cevellera bearing FDLE Case

No: OC-90-56-001 dated May 15, 1990.

3. That the allegations of the aforementioned Probable Cause Affidavit indicate that the investigation concerning the Defendant, CHARLES LOUIS DeCARLO, was "opened based on intelligence information that DeCARLO may be involved in smuggling/money laundering activities". The allegations of the Probable Cause Affidavit (herein referred to as "Affidavit") support the conclusion that the Defendant "may" be involved in smuggling/money laundering activities by referring to a June, 1984 crash of a Cessna 182 aircraft upon an airstrip owned by the Defendant, located in Rosewood, Levy County, Florida. The Affidavit describes the occupants of the aircraft and delineates the criminal records of each. The Affidavit further relates a statement allegedly made by the Defendant to investigators at the scene

of the crash indicating that the occupants of the aircraft were there to see him about purchasing land. The Affidavit concludes that the "buying land" statement allegedly made by DeCARLO to investigators investigating an aircraft crash upon his property some six years prior to the alleged criminal activity herein constitutes a "cover story" similar to the one used by DeCARLO herein.

4. That the only allegations of the Affidavit constituting "intelligence information" that the Defendant CHARLES DeCARLO, "may" be involved in narcotics smuggling activities are those that relate to the June, 1984 crash of a Cessna 182 aircraft upon an airstrip owned by the Defendant. Nowhere in the Probable Cause Affidavit does it state, or even suggest, that any confidential source, intercepted communication, or

other reliable, or unreliable, information had come to the attention of any law enforcement agency that the Defendant was involved in narcotics smuggling activities such that FDLE would have sufficient reason to believe that the Defendant was participating in ongoing, criminal activity in 1989 and 1990.

5. The Affidavit attempts to justify the opening of an investigation against the Defendant, CHARLES LOUIS DeCARLO, based, in part, upon the alleged criminal records of the occupants of the Cessna 182 aircraft that crashed upon the Defendant's airstrip in June, 1984. Such information does not even rise to the level of "bare suspicion" of ongoing criminal activity for the following reasons:

a) Of the four occupants of the aircraft, the Affidavit alleges that

three occupants possessed criminal records concerning narcotics related activities, to-wit: PAUL VINCENT GONZALES, SOTEROS LAWRENCE COCALIS and ROBERT JOSEPH JABO. As to GONZALES, the Affidavit recites a criminal history inquiry made by FDLE which shows that GONZALES was arrested by United States Marshals for importation of marijuana (1983) and conspiracy with intent to distribute cocaine (1984). The Affidavit further recites a criminal history on GONZALES which includes a 1979 arrest in Hendry County, Florida for trafficking in marijuana which resulted in a conviction and the imposition of a fine and probation. However, nowhere in the Affidavit does it state that the Defendant, CHARLES LOUIS DeCARLO, knew of the criminal history of GONZALES which predated the June, 1984 crash of the Cessna upon his airstrip. The Affidavit

goes on to recite a 1989 arrest of GONZALES for possession of a controlled substance with intent to distribute. The Affidavit also relates a criminal history of COCALIS which indicates an arrest in 1983 on charges unrelated to narcotics trafficking, to-wit: EXTORTION and KIDNAPPING. The only criminal history of COCALIS that relates to narcotics trafficking activity occurs in 1987, three years after the crash of the Cessna upon the airstrip owned by the Defendant. Finally, the Affidavit relates an arrest of occupant JABO for inter alia, possession of cocaine in 1988, four years after the crash of the Cessna upon the airstrip owned by the Defendant. The Affidavit is devoid of any "intelligence information" indicating that the Defendant, CHARLES LOUIS DeCARLO, even knew of the alleged narcotics activity of the only occupant of the aircraft,

GONZALES, that predated the crash of the aircraft upon his property. Presumably, pursuant to Federal law, a full Federal Aviation Administration (FAA) investigation of the crash took place. However, nowhere in the Affidavit does it indicate that any narcotics, or residue of narcotics, was found in the body of the crashed Cessna, or that the Defendant knew of same. Nowhere in the Affidavit does it state that <u>any</u> of the occupants of the aircraft were found to be in possession of narcotics, or residue of narcotics, and that the Defendant knew of same. Nowhere in the Affidavit does it state that any of the occupants of the aircraft possessed large sums of money, or that the Defendant knew of same. In short, the Affidavit is devoid of any reasonable suspicion that the contact, if any, between the Defendant and the occupants of the ill-fated Cessna 182

aircraft was narcotics related. The inclusion of narcotics charges against the occupants of the aircraft which obviously postdate the date of the crash constitutes an attempt to suggest that the alleged meeting between the Defendant and these individuals in June, 1984, was narcotics related. However, there is no evidence in the Probable Cause Affidavit itself, or reasonable inferences from the evidence, to support this conclusion.

b) The Affidavit further attempts to "bootstrap" reasonable suspicion of narcotics related activity in connection with the June, 1984 crash of the Cessna by indicating that Defendant DeCARLO had advised "investigators" at the scene that the occupants of the aircraft had approached him about purchasing some land. The Affidavit goes on to suggest that this is a "cover story" that was repeated by

DeCARLO to undercover agents of FDLE in connection with the instant alleged narcotics transaction. Once again, the allegations of the Affidavit itself do not support any suspicion of criminal activity relating to narcotics trafficking. The first contact that FDLE had with the Defendant occurred when an individual named JAMES KEMP introduced a confidential source to the Defendant on October 7, 1989. At that meeting, the only topic of conversation alluded to in the Affidavit concerned the Defendant permitting undercover FDLE Agent Martindale to land his plane on the Defendant's airstrip in Rosewood, Florida. In subsequent meetings dated October 14, 1989, October 15, 1989 and October 22, 1989, discussions concerning the use of DeCARLO's airstrip continued. The Affidavit even makes reference to a statement allegedly made by DeCARLO that

he had "checked out" the confidential source as well as Undercover Agent Martindale as well as the aircraft to be landed at his airstrip and that "all are OK". Nowhere in the Probable Cause Affidavit does it state that either the Undercover Agent or the confidential source stated to Defendant DeCARLO that the purpose of utilizing his airstrip would be to smuggle narcotics. In fact, the first mention of purchasing property was made on January 26, 1990, nearly one full year after the commencement of the original investigation and over three months since the initial meeting between the confidential source and DeCARLO. The Affidavit relates the following as to that meeting:

> On January 26, 1990, as a part of the ongoing scenario, Undercover SA Roger Martindale flew into DeCARLO's airstrip in Rosewood, Florida with Undercover SAs Carlos Bosch and Gene Caso. All were met by Undercover SA Bridges and the confidential source.

> After arrival at the Cedars Restaurant in Rosewood, U/C SAs Bosch, Caso, Bridges and confidential source (sic) met with DeCARLO. DeCARLO inquired as to what everyone was doing in Cedar Key, U/C SA Bosch stated "looking for property". DeCARLO replied "what about buying the restaurant"? U/C SA Bosch looked at U/C SA Caso and stated "this would be a good place to launder money." DeCARLO inquired "what about now?" U/C SA Bosch replied "maybe down the road". (emphasis supplied)

Thus, when DeCARLO inquired as to what "everyone was doing in Cedar Key" it was Undercover Special Agent Bosch, an agent of the State of Florida, who replied to the Defendant that he was "looking for property". Earlier in that Affidavit, it states that "this is the same "cover story" that DeCARLO suggested to Undercover FDLE SAs Carlos Bosch and Gene Caso in subsequent undercover narcotics meetings." Thus, the Affidavit in internally inconsistent as to who suggested the purchase of DeCARLO's property. In the body of the Affidavit

intended to bolster "probable cause" it states that DeCARLO suggested the purchase of his property as a "cover story", whereas the Affidavit itself later makes clear it was FDLE Agent Bosch who first brought up the question of purchasing property. Moreover, the statement made in the Probable Cause Affidavit in connection with the January 26, 1990 meeting concerning the laundering of money is likewise deceptive. The Probable Cause Affidavit states that "U/C SA Bosch looked at U/C SA Caso and stated "this would be a good place to launder money," to which the Defendant then allegedly inquired "what about now?" Thus, the Affidavit gives the clear impression that the Defendant heard the conversation between SA Bosch and Caso concerning the use of the Defendant's property to launder money. An investigative report filed by SA Bosch

dated February 7, 1990, (serial number 89) suggests an entirely different course of events. In pertinent part if provides as follows:

> DeCARLO asked what they (undercover agents) were were doing in town. SA Bosch indicated that they were in town looking at the area for business. DeCARLO asked what about buying this restaurant to which SA Bosch replied, "maybe down the road." SA Bosch whispered to SA Caso, "this would be a good place to launder money." The odds for DeCARLO to hear this statement are very low and it was intended to be (sic)." (emphasis supplied)

Accordingly, it was agents of the State of Florida who initially suggested that they were in town looking for property and the Defendant did not initiate this inquiry as a "cover story" as clearly, and falsely, stated by the Probable Cause Affidavit itself. Moreover, any suggestion that agents of the State of Florida were justified in focusing on the Defendant based on the events of January 26, 1990 due to the Defendant's knowledge

that the agents intended to purchase the property as a "good place to launder money" are refuted by the report of Agent Bosch himself that indicates that the statement was intentionally made outside of the hearing of the Defendant.

Accordingly, the alleged justification for the "opening" of an investigation against the Defendant, to-wit: (1) the crash of the Cessna 182 aircraft upon the Defendant's property in June, 1984 and, (2) the continued use, by DeCARLO, of a "cover story" of purchasing property to mask discussions of narcotics related activity are without merit. In fact, agents of the State of Florida, according to their own Affidavit, possessed no suspicion of criminal activity sufficient to justify their continued, and persistent contact with the Defendant as later outlined in the Affidavit itself.

6. As stated by the Florida Supreme Court in Cruz v.State, 465 So.2d 516 (Fla. 1985):

> "To guide the trial courts, we propound the following threshold test of an entrapment defense: Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity.
> Id. at 522 (emphasis supplied)

By-contrast, the Probable Cause Affidavit itself fails to relate any specific, ongoing criminal activity which law enforcement intended to interrupt by focusing upon the Defendant herein. The only allegations, refuted herein, contained in the Probable Cause Affidavit, which suggest drug related criminality of the Defendant pertain to an event which occurred in June, 1984. There is no suggestion in the Affidavit that there was any contact between the Defendant and the occupants of the

crashed aircraft from June, 1984 until the time FDLE met the Defendant. Moreover, the Affidavit itself fails to recite that the initial meeting between the undercover source and the Defendant, through James Kemp, which occurred on October 7, 1989, was in connection with any discussion of drug related activity. As stated by the Florida Supreme Court in Cruz, supra,

> "The first prong of this test addresses the problem of police "virtue testing", that is, police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime. As Justice Roberts wrote in his separate opinion in Sorrels, "Society is at war with the criminal classes," (citation omitted) police must fight this war, not engage in the manufacture of new hostilities."

As to the second prong of the test, if the Affidavit is to be believed, FDLE agents allegedly possessed the knowledge, prior to focusing upon DeCARLO, that DeCARLO was interested in selling his property. Presumably, for this reason,

agents on January 26, 1990 suggested to DeCARLO that they were "looking for property" and when DeCARLO suggested that his restaurant was for sale, agents responded "maybe down the road". What occurred "down the road" were specific suggestions by FDLE agents that they would purchase the Defendant's property at a substantially inflated price, in cash. The action of the State of Florida in offering to purchase the Defendant's property at an inflated price satisfies the second prong of the threshold test by "employing methods of persuasion of inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." Cruz, page 522.

7. The instant case is a "reverse sting" operation wherein agents of the State of Florida supplied the narcotics which formed the basis of the conspiracy

and trafficking charges. Prior to the initiation of the focus upon DeCARLO, agents of the State of Florida possessed no information that the Defendant was involved in narcotics related activity. Indeed, subsequent to the arrest of DeCARLO, a thorough search of his residence and properties failed to reveal any narcotics other than that which was placed upon the property by agents of the State of Florida. In short, there was no evidence of any prior misconduct of the Defendant relating to narcotics activities that would have shown his predisposition to commit such an offense. There was no evidence that the Defendant was engaged in any ongoing criminal activity before the intervention of law enforcement itself. Finally, the allegations of the Probable Cause Affidavit indicate that the inflated cash price offered by agents of law

enforcement to the Defendant for the purchase of his properties suggest that the Defendant "succumbed to temptation". Casper, page 265.

8. The burden placed upon the State of Florida when the defense of entrapment as a matter of law as raised is to demonstrate or allege "facts tending to show a predisposition on the accused's part to commit the crime". Id. In the instant case, the Affidavit itself, coupled with the investigative reports of specific agents, demonstrate the failure of the State of Florida to show the predisposition of the Defendant to commit the crime as well as the failure to interrupt specific, ongoing criminal activity on the part of the Defendant. As a result, the Defendant has met his burden of showing entrapment as a matter of law.

8. That the Probable Cause

Affidavit prepared by Case Agent Mike Cevellera is attached herein and incorporated by reference herein as Defendant's Exhibit "A" hereto.

9. That the Florida Department of Law Enforcement Investigative Report of Special Agent C. Bosch dated February 7, 1990 (serial number 89) is attached hereto and incorporated herein as Defendant's Exhibit "B" hereto.

WHEREFORE, it is respectfully submitted that this Court should enter its order dismissing all Counts of the Information herein for the reasons, and upon the authority, cited above.

Respectfully submitted,

SMITH, SILVERMAN, SCHAFFNIT & FLETCHER, P.A.

/S/

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b. Initial Brief, Fifth District Court of Appeal

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

CHARLES LOUIS DECARLO,

Appellant,

vs.

APPEAL
NUMBER: 91-1070

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE
CIRCUIT COURT OF THE FIFTH JUDICIAL
€IRCUIT
IN AND FOR MARION COUNTY, FLORIDA

CASE NUMBER: 89-1189-CF

HONORABLE WILLIAM SWIGERT

INITIAL BRIEF OF APPELLANT

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* * *

I. APPELLANT CHARLES LOUIS DECARLO WAS ENTRAPPED AS A MATTER OF LAW BASED UPON THE COMPLETE ABSENCE OF SPECIFIC ONGOING CRIMINAL ACTIVITY ON HIS PART PRECEDING LAW ENFORCEMENT'S REVERSE STING OPERATION IN THIS CASE.

The Record in this cause unequivocally demonstrates that from the initial contact FDLE had with CHARLES LOUIS DECARLO on September 25, 1989, until the investigation was completed culminating in Appellant's arrest on May 15, 1990, there was never any ongoing criminal investigation of DeCarlo other than that instigated by FDLE itself (R. 1211), and that FDLE never discovered any ongoing drug-related criminal activity concerning Appellant other than that which was introduced to him by FDLE itself as part of "Operation Fishhook" (R. 1211). Agent Bridges, the only sworn FDLE officer present in Cedar Key continuously from January 5, 1990 until May 15, 1990, conceded this in his trial testimony as follows:

> "Q All right. My question is from the time period that you started your investigation on January 5th, 1990, until May 15th of 1990 you didn't

discover any other ongoing drug related criminal activity concerning Mr. DeCarlo other than that which you introduced to him; correct?

A Correct.

Q And, in fact, on January 5th, 1990, when you commenced your activities, there was no ongoing investigation of any drug related activity involving Mr. DeCarlo?

A Not that I'm aware of, no." (R. 1211).

In Cruz v. State, 465 So.2d 516 (Fla. 1985), the Florida Supreme Court recognized that the issue of "objective entrapment" is a matter of law for the Court to decide without reference to any element of the predisposition of the accused. Id. Cruz, supra, set forth the test to determine the existence of objective entrapment as follows:

"To guide the trial courts, we propound the following threshold test of an entrapment defense: Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of

> a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity. Id. at 522 (emphasis supplied).

On August 29, 1991, the Florida Supreme Court, in State v. Hunter and Conklin, 16 F.L.W. S588 (Fla. August 29, 1991), reaffirmed the doctrine of "objective entrapment" established in Cruz, supra, by specifically holding that:

> "In Cruz we stated that the state must "establish initially whether 'police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.'" 465 So.2d at 521 (quoting Sherman v. United States, 356 U.S. 369, 382 (1958), Frankfurter, J., concurring in result). To guide trial courts, we set out a threshold test for establishing entrapment: "Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those

> involved in the ongoing criminal activity." Id. at 522 (emphasis added). By focusing on policy conduct, this objective entrapment standard includes due process considerations.
>
> Diamond had become the state's agent, and his acts must be construed as "police activity." His activities, however, meet neither part of the Cruz test, let alone both, because there was no "specific ongoing criminal activity" until Diamond created such activity in order to meet his quota. Therefore, as in Cruz, Conklin established entrapment as a matter of law, and the trial court erred in denying his motion for judgment of acquittal based on entrapment. Cf. Myers, Marrero v. State, 493 So.2d 463 (Fla. 3rd DCA 1985), review denied, 488 So.2d 831 (Fla. 1986)." Id. at S589.
>
> (emphasis added)

The State of Florida clearly cannot rebut the existence of the first prong of the Cruz, supra, and Hunter, supra, threshold test in this case because, by their own agents' testimony in both pre-trial and trial proceedings, DeCarlo was

not included in the list of individuals suspected of narcotic-related activity in Cedar Key when the investigation commenced in February, 1989 (R. 509). Prior to Byer's first "chance" meeting with DeCarlo on September 25, 1989, he was not known to law enforcement (R. 839). Throughout the entire course of the investigation concluding in DeCarlo's arrest on May 15, 1990, no non-FDLE initiated ongoing criminal investigations of DeCarlo were discovered, nor was any non-FDLE instigated "specific ongoing criminal activity" by DeCarlo ever discovered such that it could be "interrupted." Smith v. State, 575 So.2d 776 (Fla. 5th DCA 1991) (applying the Cruz, supra threshold test of objective entrapment). Where law enforcement, with the cooperation of an informant, does not have as its end the interruption of specific, ongoing criminal activity by

the target of the investigation, but rather initiates, instigates, generates and manufactures a crime where none is extant, its conduct violates the essential first prong of the Cruz, supra, threshold test for "objective entrapment." Pezzella v. State, 513 So.2d 1328, 1329 (Fla. 3d DCA 1987); Marrero v. State, 493 So.2d 463 (Fla. 3d DCA 1985); review denied, 488 So.2d 831 (Fla. 1986). As the Court in Cruz specifically held:

> "The first prong of this test addresses the problem of police "virtue testing", that is, police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime. As Justice Robert wrote in his separate opinion in Sorrels, "Society is at war with the criminal classes," (citation omitted) Police must fight this war, not engage in the manufacture of new hostilities." Id. at 522.

Law enforcement's manufacture of both the criminal activity as well as the

supplying of the contraband itself is a practice uniformally held to constitute "objective entrapment" of the accused. Pezzella, supra; Lusby v. State, 507 So.2d 611, 612 (Fla. 4th DCA 1987).

The second prong of the Cruz, supra, Hunter, supra test is clearly not in issue in the instant case where there is not ongoing criminal activity on the part of the accused such that the Court would need to examine whether law enforcement "utilize(d) means reasonably tailored to apprehend" individuals so involved. This second prong of the Cruz test is examined only if there existed specific ongoing criminal activity on the part of the accused before law enforcement's involvement. Hunter, supra, at S589.

As stated in Hunter, "objective entrapment" focuses on the "objective acts" leading up to the Defendant's arrest, not on the predisposition of the

accused. Id. at S590. Nor does "objective entrapment" involve such issues as whether, regardless of predisposition, the accused nevertheless demonstrated "ready acquiescence" to participate in criminal activity that is generated by law enforcement. State v. Sokos, 426 So.2d 1044 (Fla.2d DCA 1983). Issues such as "predisposition" and "ready acquiescence" are for the jury's determination based upon principles of "subjective entrapment." Hunter, supra at S590; Sokos, supra, at 1045.

As this Court stated in State v. Banks, 499 So.2d 894 (Fla. 5th DCA 1986) actions of law enforcement must be "accurately directed only at the apprehension of one involved in a specific ongoing criminal activity." Id. at 895 (relying upon and applying the Cruz test). This "objective entrapment standard" has specifically been held to

include due process considerations, Hunter, supra at S589, seemingly rooted at a minimum in Article I, §9 of the Florida Constitution (concurring opinion of Justice Kogan, Hunter, supra at S590). Indeed, therefore, the legislature is without authority to even attempt to authorize law enforcement to do what they have in the instant case -- to wit: create new criminal activity or manufacture crime. Hunter, supra at S589, citing, State v. Embry, 563 So.2d 147, 149 (Fla.2d DCA 1990).

Even assuming, arguendo, that the second prong of the Cruz test need be addressed at all by this Court, law enforcement clearly did not employ "means reasonably tailored to apprehend" someone involved in ongoing criminal activity. Cruz, supra at 522. Having possession of a list of specific names of individuals suspected of being involved

in ongoing criminal activity, supplied by the chief law enforcement officer in the county where the investigation is to take place, before the investigation is initiated, FDLE chose to ignore the names on the list and focus instead on someone not on the list - CHARLES LOUIS DECARLO. (R. 507-509; R.S. 54). When FDLE's agents' own surveillance fails to reveal any drug-related transactions from February, 1989 (R. 440), FDLE initiated a statewide search for a confidential source (R. 438) who, when located, was specifically and intentionally deprived of the list of individuals who are involved in specific, ongoing drug-related criminal activity (R. 445; R. 833). The source FDLE selected to initiate the investigation of "street-level" drug activity was himself "working off" (R. 648) a cooperation agreement on a plethora of serious felony offenses (R.

803; R. 799; R. 520-521) that the source believed could net him up to twenty-five (25) years imprisonment (R. 799). The source was compensated both for his "services" as well as his expenses (R. 805) and was placed upon a form of supervision, community control, that specifically would have precluded nearly each and every activity he engaged in for FDLE during his work in Cedar Key from August, 1989 to May 15, 1990 (R. 811-813); R. 654).

The source's activities from August, 1989 through January 4, 1990 were monitored, if at all, "mostly by phone" (R. 653). Told to make contact with drug suspects, the source himself was never tested for drugs (R. 817) by his controlling agent with whom he had no previous relationship (R. 517).

The source was completely unsuccessful for over two (2) months

until his role was changed by FDLE ten (10) days after a non-criminally related contract with DeCarlo (R. 659).

From the initial meeting with DeCarlo on September 25, 1989, when the source initiated unrecorded conversation regarding DeCarlo's property (R. 847), every contact FDLE makes with DeCarlo thereafter involved FDLE agents constructing a scenario whereby full and unfair advantage is taken of DeCarlo's "obsession" with his mortgage-free properties and their eventual sale (R. 869; R. 1246); R. 870). In the end, on May 15, 1990, fully two-thirds of the three million dollars in cash DeCarlo was to receive related, in some way, to the property sale, and not his "services" in aid of the cocaine transaction (R. 2163-2164; R. 2199; R. 2201; R. 1286).

DeCarlo, without any justification, was targeted as early as November, 1989

(R. 598; R. 703). He was considered a "major target" by the case agent (R. 598) who thereafter influenced each and every law enforcement and source perception of DeCarlo thereafter (R. 1100).

Arrangements were made to further target DeCarlo specifically by fly-ins to his airstrip, with and without his knowledge or permission, on at least four (4) occasions prior to March 27, 1990. On that date, DeCarlo was told his airstrip has already been used to fly-in drugs by a "Colombian" drug smuggling group - the "Carlos Organization" (R. 1269). Despite no observation of criminal activity by DeCarlo, or on any of his properties, from September 25, 1989 until March 26, 1990 (R. 1209), the field agents and the source made forty-five (45) documented visits to DeCarlo and his businesses to gain his confidence (R. 1207; R. 1332).

Aside from targeting someone not involved in drug-related activity during this time period, FDLE specifically ignored three (3) separate incidents of suspicious, drug-related activity engaged in by other individuals in one day alone (R. 856-857; R. 1156).

Clearly, had the FDLE been interested in determining whether DeCarlo would display "ready acquiescence" to their drug plan without regard to his "obsession" with selling his property, all they had to do was to instruct their agents to inform DeCarlo that there was no interest in purchasing his property even "down the road" (R. 1951). Instead, it is the common thread, the omnipresent "bait" used by State's agents, who had "cast their nets in impermissible waters" Cruz, supra at 522, as an integral part of "Operation Fishhook." As the Court noted in Cruz,

supra:

> "...entrapment has occurred where the decoy simply provides the opportunity to commit a crime to anyone who succumbed to the lure of the bait." Id. at 522-523.

Moreover, FDLE had full knowledge throughout the course of this investigation of DeCarlo's additional vulnerability through the excessive consumption of alcohol (R. 1271; R. 873-876); R. 1274-1275), a vulnerability which they capitalized upon by offering to buy him drinks during critical stages of the investigation (R. 1279) as well as creating videotapes wherein DeCarlo discussed drug activities while under the influence of alcohol (R. 1276).

During the entire operation the State created scenarios and planned meetings to suit their jurisdictional, prosecutorial and venue needs (R. 2751-2759; R. 2763-2772) while planning the

ultimate coup of seizing and forfeiting DeCarlo's mortgage-free properties (R. 599) by specifically implicating their use as storage sites for their operation (R. 600-601).

FDLE constructed the operation so as to allow DeCarlo, a man with no prior record, an opportunity to realize an "exorbitant gain" ($3,000,000.00), tax-free. See Lusby, supra. FDLE then held out the prospect of larger future profits (R. 2072-2074) at the same meeting in which DeCarlo was told that the "Carlos" organization is "definitely interested in buying your property." (R. 975).

DeCarlo clearly did succumb to these, as well as other, examples of improper temptation. See State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982).

The individual inducements, lures and artifices used by FDLE, taken alone

or in their totality, offend basic notions of due process and fundamental fairness guaranteed by Article 1, Section 9 of the Florida Constitution. Hunter, supra at S589, S590.

Taken together, the actions of FDLE even offend the more restrictive notions of due process under the Fifth Amendment to the Constitution of the United States as applied by controlling Federal precedent. As stated by the Court in United States v. Tobias, 662 F.2d 381, 386 (5th Cir., Unit B, 1981):

> "On the other end of the spectrum, however, the government may not instigate the criminal activity, provide the place, equipment, supplies and know-how, and run the entire operation with only meager assistance from the defendants without violating fundamental fairness. (citing United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978). Id. at 386.

Relying upon Tobias, supra, the Eleventh Circuit Court of Appeals acknowledged

that (Tobias) "set the outer limits to which the government may go in the quest to ferret out and prosecute crimes." United States v. Savage, 801 F.2d 867 (11th Cir. 1983).

The trial Court accordingly committed reversible error in denying DeCarlo's pre-trial Motion to Dismiss Due to Entrapment as a Matter of Law (R. 2858-2889; R. 2957); DeCarlo's Motion for Judgment of Acquittal during trial (R. 2238-2299); as well as DeCarlo's Motion for New Trial (R. 3298-3319). The only remedy for violation of due process and the notions embodied in the doctrine of "objective entrapment" is the release of "all persons so ensnared." Cruz, supra at 520.

* * *